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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

HARKINS AND COMPANY, *et al.*,
Petitioners,

v.

JAMES W. ELLIOTT, JR., *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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QUESTIONS PRESENTED

1. Whether a state supreme court's failure to address in a written opinion Petitioners' constitutional claim of bias by a state trial court, which issue was first properly raised before the state supreme court, deprived Petitioners of their property and liberty without due process of law.

2. Whether the statement of a trial judge indicating that he was relying on his personal impressions of persons importantly involved in the relevant facts at issue, which opinions were based entirely on extrajudicial sources, reflected a bias which so tainted the trial court proceeding as to deprive Petitioners of their property without due process of law.

3. Whether, in view of the fact that the decision of the state courts is completely inconsistent with the controlling state substantive law precedent, the decision on the merits is so arbitrary and capricious as to constitute a denial of due process of law.

PARTIES TO THE PROCEEDING BELOW

Petitioners and appellants in *Harkins and Company, et al. v. James W. Elliott, Jr., et al.*, were St. Joe Petroleum (U.S.) Corporation; First Energy Corporation; First Mississippi Corporation; Amerada Hess Corporation;* Jerry E. Zoble; A. G. Holzapfel, Trustee for Mississippi-Alabama Employees Trust No. 2 and Harkins and Company, Employees Profit Sharing Plan No. 1; H. B. Harkins; Harry W. Hamilton; Harry W. Hamilton, Agent; James R. Lesch; Raymond M. Holliday; Ray Butler; Granville G. Tunstill; Warren Donaldson; H. D. Lee; Troy Anderson; John S. Dale; Harold A. Dale; David B. Dale; Irene Dale Polk; Katherine D. Little; James L. Dale; Alberta D. Baylis; Muncie Dale Smith; Ethlyn D. Turnage; Marilyn B. Michael; Ben G. Walden, Jr.; Bobbie W. Foster; M. R. Walden, Sr.; Madison S. Dale; Frances D. Pillow; Joseph Dale; Betty D. Touchstone; Bess S. Dale; Sarah Dale Polk; Ada Dale Gulledge; Mancie Dale Johnson; Robert M. Dale; Thomas D. Dale; Robin Dale Fuller; Richard S. Dale and Harkins and Company.

Respondents and appellees were Tullius Brady, Donald B. Pierce, E. L. Dunn, Paul D. Smith, C. E. Locklin, Jr., B. C. Griffith and James W. Elliott, Jr.

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* The parent company of St. Joe Petroleum (U.S.) Corporation is Fluor Corporation; its affiliates are St. Joe Minerals Corporation and Coquina Oil Corporation. The parent company of First Energy Corporation is First Mississippi Corporation; its affiliates are Triad Chemical; First United, Inc.; Melamine Chemicals, Inc.; First Management Company; and F[illegible]t Delta Cement Corporation. Subsidiaries of Amerada Hess Corporation are: Amerada Hess Petrolmos Chile, S.A.; Amerada Hess Communications Corporation; Amerada Hess International Capital Corporation; Air Hanger, Inc.; Amerada Hess Corporation of Nevada; Esperanza Petroleum Corporation. Affiliates of Amerada Hess Corporation are: Wyatt, Inc.; Solar Gas, Inc.; Oasis Oil Company of Libya, Inc.; Bushehr Petroleum Company; Matco Tankers (U.K.) Ltd.; Anglomar Shipping Company, Ltd.; First United Shipping Corporation; Second United Shipping Corporation; Interocean Tanker Corporation; Grand Reunion Company; Atlas Marine Company; Artemis Marine Company, L.P.; Adriadne Company, L.P.; St. Croix Petrochemical Corporation; Conmer Terminals, Ltd.; D'ippolito Oil Company; Meadville Corporation; Reserve Terminal Corporation; Second Reserve Terminal Corporation; and South Jersey Terminal Corporation.

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OPINION BELOW

The Supreme Court of Mississippi ("State Supreme Court") on March 17, 1982 affirmed, without opinion, a January 7, 1981 final decree of the Chancery Court of Jefferson Davis County, Mississippi ("Trial Court"). *See* Appendix A at 1a. (The January 7, 1981 final decree of the Trial Court appears in Appendix B at 2a.) On June 30, 1982, the State Supreme Court denied a timely petition for rehearing *en banc*. *See* Appendix C at 6a.

JURISDICTION

Following the State Supreme Court's June 30, 1982 denial of the petition for rehearing *en banc* of its March 17, 1982 decision, a timely application for an extension of time to file this Petition by November 12, 1982 was granted by this Court on September 15, 1982.

This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

The controlling constitutional provision presented is the Constitution of the United States, fourteenth amendment, section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On December 8, 1981, the Trial Court heard the case of *James W. Elliott, Jr., et al. v. Harkins and Company, et al.* in which James W. Elliott, Jr. ("Elliott") brought an action to confirm and quiet title to an undivided oil, gas, and mineral interest in a 320-acre, gas-producing tract of land located in Jefferson Davis County, Mississippi. The value of the oil, gas and mineral interests at issue may exceed five million dollars. Brief in Support of Appellants' Petition for Rehearing at 3, *Harkins and Company, et al. v. Elliott, et al.*, No. 53,095 (Miss. Sup. Ct., Mar. 17, 1982), *reh'g denied*, June 30, 1982.

At trial, the factual inquiry focused on the underlying deed at issue, a Mineral Right and Royalty Transfer Deed executed on July 5, 1944 ("the Deed") by Elliott's predecessor-in-interest (B.C. Griffith, the grantor) to Harkins and Company's ("Harkins'") predecessor-in-interest (Robert B. Dale, the grantee). The Deed contained a clause providing that "this instrument is to convey to grantee all of grantor's mineral rights

in and to above described land" (hereinafter "all rights clause") and a granting clause indicating that Griffith was conveying to Robert B. Dale a 9/32's interest. However, Griffith possessed only a 4.5/32's interest on the date that the Deed was executed, although less than a year thereafter, he acquired another 4.5/32's interest. At trial, Elliott contended that Griffith's after-acquired interest had not passed under the Deed. After all evidence and arguments had been presented to the Trial Court, but immediately before that court stated its findings of fact and conclusions of law, the Chancellor ("Trial Judge") made the following statement (hereinafter "Statement of Bias"):

> I knew both B.C. Griffith and Robert Dale, they weren't anybody's fools, they were good businessmen and knowledgeable about the oil business and would not have put something in the instrument without some reason, unless it meant something.

Bill of Exceptions, Appendix D at 7a.

It is clear from the context of the transcript of the Trial Court hearing that in making the statement "put something in the instrument" the Trial Judge was referring to the all rights clause.

The record makes obvious that, based on the Trial Judge's personal opinions of Messrs. Griffith and Dale, personal opinions certainly based on extrajudicial sources, involving impressions apparently formed decades ago, he concluded that they had a reason for including the all rights clause in the Deed, *i.e.*, that the clause was not inadvertently included. Having reached that threshold determination based on extrajudicial "evidence," the Trial Judge then concluded (illogically) that the inclusion of the all rights clause limited the conveyance to Griffith's actual 4.5/32's interest owned on the date of the Deed, and that consequently the after-acquired title doctrine (under which a subsequently acquired interest would be deemed to have been conveyed on the date of execution of the deed being construed) did not apply to the Deed, and Griffith's after-acquired interest did not pass.

The Trial Court issued a written final decree on January 7, 1981. On January 16, 1981, Harkins, for the purpose of preserving for the record the fact that the Statement of Bias had been made by the Trial Judge (the Statement of Bias was made during an interval when the court reporter did not record the proceedings), filed a timely Bill of Exceptions which was signed by the Trial Judge who thereby acknowledged the accuracy of the Statement of Bias as set forth in the Bill of Exceptions. *See* Appendix D at 7a.

Harkins appealed the Trial Court decision to the State Supreme Court[1] on July 10, 1981, in which appeal Harkins, *inter alia,* raised the constitutional issues[2] that the Trial Judge's statement concerning his personal knowledge and personal opinions of B.C. Griffith and Robert B. Dale (i) represented a consideration of facts not in evidence, (ii) substantially colored the Trial Judge's interpretation of the Deed and (iii) constituted reversible error. Brief for Appellants at 23-25, *Harkins, supra.* The State Supreme Court, on March 17, 1982, affirmed the final decree of the Trial Court without rendering a written opinion. On April 6, 1982, Harkins filed a petition for rehearing in the State Supreme Court, raising the constitutional issues of (i) the Trial Judge's bias and his reliance on personal opinion based on extrajudicial material as to the merits of the case and (ii) the failure of the State Supreme Court even to address the bias issue in a written opinion. The State Supreme Court denied the petition for rehearing on June 30, 1982, again without rendering an opinion.

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[1] In Mississippi, appeal from Chancery Court is made, as a matter of right, directly to the Mississippi Supreme Court, which may not refuse to hear an appeal. Miss. Code §§ 11-51-1 *et seq.* (1972).

[2] That Harkins' constitutional claims were adequately raised below is demonstrated by application to the facts of the Court's admonition that "[n]o particular form of words or phrases is essential but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time" in order to raise a federal claim. Bryant v. Zimmerman, 278 U.S. 63, 67 (1928) quoted in PruneYard Shopping Center v. Robins, 447 U.S. 74, 85, n. 9 (1980).

REASONS FOR GRANTING THE WRIT

The legal issues raised by this Petition are unique and present this Court with the opportunity to address important issues, national in scope, bearing upon the relationship of the federal courts to state courts and upon how far the Constitution requires states to proceed in allowing meaningful access to the courts. *See,* L. Tribe, *American Constitutional Law,* § 10-18 (1978). That is, the Court is presented with the opportunity to articulate explicitly the scope of the Constitution's due process clause in circumstances where litigation has been initiated in state court on issues solely of state law involving entirely private parties. More specifically, as the discussion below demonstrates, this Court (i) has never addressed whether the due process clause is violated where a state court before which a constitutional claim is first properly raised fails to address that claim in a written opinion, (ii) has not recently defined the scope of the due process clause with respect to the particular judicial bias presented in this case, or (iii) affirmed or elaborated the proposition last stated by this Court over half a century ago that decisions of state courts on matters of state law should not be disturbed "unless the judgment amounts to mere arbitrary or capricious exercise of power or is in clear conflict with those fundamental 'principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights.'" *American Railway Exp. Co. v. Kentucky,* 273 U.S. 269, 273 (1927) *quoting Pennoyer v. Neff,* 95 U.S. 714, 733 (1878).

1. THIS CASE PRESENTS THE COURT WITH THE OPPORTUNITY TO HOLD THAT A STATE COURT BEFORE WHICH A DUE PROCESS CLAIM IS FIRST PROPERLY RAISED MUST ISSUE A WRITTEN OPINION RESPONDING TO THE CLAIM EVEN WHERE THE STATE LITIGATION INVOLVES PRIVATE PARTIES ONLY AND WAS INITIATED TO RESOLVE MATTERS OF STATE LAW ONLY.

This Court has never explicitly held whether, in a proceeding involving entirely private parties, state civil law, and state

judicial action, the due process clause requires the state court before which an issue is first properly raised to render a written opinion on the merits of the claim, particularly in circumstances where the highest state court is the court before which the issue is first properly raised and the due process claim arises out of the action of the trial court.

Before considering specific statements by the Court relevant to the importance of a court issuing a written opinion, it should first be noted that the case presented satisfies the threshold requirements of the fourteenth amendment. The fourteenth amendment commands, in pertinent part, that "[n]o *State* shall . . . *deprive* any *person* of *life, liberty* or *property,* without *due process* of law" (emphasis added). Applying these requirements in the circumstances presented, it is clear that (i) a state has deprived a person of property and liberty because action by a state court is "state action" for purposes of the due process clause of the fourteenth amendment, *see, e.g., NAACP v. Alabama,* 377 U.S. 288 (1964); (ii) the fourteenth amendment's protection of property extends to encompass contract and mineral rights, *see, e.g., Board of Regents v. Roth,* 408 U.S. 564 (1972); and (iii) corporations are persons within the meaning of the fourteenth amendment, *see, e.g., First National Bank of Boston v. Bellotti,* 435 U.S. 765 (1978).

With respect to the "due process" requirement, this Court has stated frequently that the concept of due process is not a hard and fast rule but instead is flexible and applied according to the circumstances of each case (as, for example, to minimize error in state decision making). *See Brock v. North Carolina,* 344 U.S. 424 (1953). Recent decisions of this Court have stressed that the amount and quality of due process requirements will vary with the importance of the interest to be protected. *See, e.g., Goldberg v. Kelly,* 397 U.S. 254 (1970).

The Case Presented Satisfies The Court's Specific Requirements Of Its Flexible Due Process Concept Stated In *Mathews v. Eldridge*.

The Court has more specifically stated the requirements of its flexible due process concept in *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976):

> More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the *private interest* that will be affected by the official action; second, the *risk of an erroneous deprivation* of such interest *through the procedures used*, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the *Government's interest, including the function* involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. [Citations omitted.]

Id. (Emphasis added.)

Applying the first criterion stated in *Mathews* to the facts presented, the private interest at stake in this case is significant because, if the decision below is allowed to stand, Harkins will be deprived of the right to receive royalty income very possibly exceeding five million dollars and the right to receive a fair hearing in order to demonstrate the right to that income.

Applying the second criterion, there is a risk of an erroneous deprivation where, as here, a state's highest court, which must hear an appeal and before which a constitutional claim is first properly raised, fails to state its reasons for denial of that claim. Certainly, the requirement of a written statement of the legal and factual bases of a decision forces the decision maker to consider more carefully its decision, and thereby acts

as a deterrent to ill-considered, arbitrary and capricious decisions. As Judge Frank of the United States Court of Appeals for the Second Circuit stated:

> For, as every judge knows, to set down in precise words the facts as he finds them is the best way to avoid carelessness in the discharge of that duty: Often a strong impression that, on the basis of the evidence, the facts are thus-and-so gives way when it comes to expressing that impression on paper.

United States v. Forness, 125 F.2d 928, 942 (2d Cir.) *cert. denied,* 316 U.S. 694 (1942). Other reasons supporting the importance of such a written statement are that such a statement aids the appellate court by affording it a clear understanding of the basis of decision of the lower court and makes definite what is decided in the case in order to enable the application of *res judicata* and estoppel principles to subsequent decisions. *See Leighton v. One William Street Fund, Inc.,* 343 F.2d 565, 567 (2d Cir. 1965); 2B W. Barron & A. Holtzoff, *Federal Practice and Procedure* § 1121 (Rules ed. 1961); 5A J. Moore, W. Taggart & J. Wicker, *Moore's Federal Practice* ¶ 52.06 (2d ed. 1982). Consequently, the requirement of a written decision is a valuable safeguard.

Finally, the additional fiscal and administrative burden that would be required for a court to issue a written opinion would not be great.

An Explicit Holding By The Court That The Due Process Clause Requires A Written Decision In The Circumstances Presented Would Be Consistent With The Court's Precedent.

It is important that this Court take this occasion to state explicitly that the failure of a court, whether it be federal or state, before which a constitutional claim is first properly raised, to issue a written determination in response to that claim constitutes a denial of due process. A review of these cases indicates that although the Court has never made such an explicit statement, nevertheless such a statement would be

entirely consistent with the statements which the Court has made. To elaborate, those precedents indicate that whether the issuance of a written determination by a court is mandatory has depended on the importance of the issue raised. That is, the Court has stated that a statement of the factual and legal basis of a decision is "always desirable," *Pub. Serv. Comm'n v. Wisconsin Tel. Co.*, 289 U.S. 67, 69 (1933) "as an aid to litigants and to this Court," *id.*, but has implied that it is not mandatory that such a written statement be issued in cases other than those presenting circumstances where (i) state law or state officials are enjoined, *id.* at 70, (ii) "questions were important, and the amounts involved were large," *Baltimore & Ohio R.R. Co. v. United States*, 279 U.S. 781, 787 (1929), or (iii) issues of constitutional due process are presented, *see Wood v. Strickland*, 420 U.S. 308, 327 (1975); *Anders v. California*, 386 U.S. 738 (1967). Most recently, the Court has indicated that where the claim is other than frivolous or totally without merit, a written determination should be issued. *See Sumner v. Mata*, 449 U.S. 539, 548 (1981) (discussing requirement of 28 U.S.C. § 2254(d) that a state court render a written opinion after a hearing on the merits of a factual issue in a federal *habeas corpus* proceeding instituted by a state prisoner). Application to the facts presented of these statements by the Court requires the conclusion that the question presented (whether the bias of the Trial Judge deprived Harkins of due process) is certainly important, not frivolous or totally without merit, as it presents an issue of constitutional due process and the amounts involved—in excess of five million dollars—are certainly large.

Although the requirements for a written determination expressed by the Court in its precedents are clearly met in the facts presented, there nevertheless is a need for the Court to articulate that the due process clause requires a written determination in the circumstances presented in view of the facts that (i) the Court has never clearly stated whether the Constitution may form the basis of requiring such a written determination, (ii) federal statutes formed the basis of the requirement of a written decision in certain of the precedents cited above and (iii) those precedential cases arguably contain other factual

circumstances possibly distinguishing them from the case presented. Accordingly, the Court should settle an unsettled point of law involving the relationship of the federal and state court systems and, consistent with its recent precedent, *see e.g., Parratt v. Taylor,* 451 U.S. 527 (1981), articulate again the limits of intervention by federal courts in state proceedings. The Court should articulate clearly that, although certainly state courts should be permitted broad discretion with respect to their procedures and policies, nevertheless where a federal constitutional claim is first properly presented to a state court, that court, particularly if it is the highest state court, is required by the due process clause to address that claim in a written determination.

2. THIS CASE PRESENTS ISSUES AS TO THE SCOPE OF THE DUE PROCESS CLAUSE WITH RESPECT TO IMPROPER BIAS OF A JUDGE IN STATE COURT PROCEEDINGS INVOLVING PRIVATE PARTIES ONLY AND INITIATED TO RESOLVE ISSUES OF STATE LAW ONLY.

The Court has stated that "the right to an impartial decision maker is required by due process" in every case. *Arnett v. Kennedy,* 416 U.S. 134, 197 (1974) (White, J., concurring in part, dissenting in part). *Accord, Mayberry v. Pennsylvania,* 400 U.S. 455, 469 (1971) (Harlan, J., concurring) ("appearance of even handed justice ... is at the core of due process").

Accordingly, it is not surprising to note that allegations of judicial bias have been addressed in a large number of federal court decisions. Federal courts have clearly held that certain "types" of bias are impermissible. However, neither this Court nor other federal courts have clearly articulated how to respond to cases such as the instant one involving particular expressions of bias which do not fit within those bias "types" frequently reviewed.[3]

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[3] Those "types" of bias frequently considered by federal courts include: (i) bias reflecting personal financial interest, *e.g.,* Tumey v. Ohio, 273 U.S. 510 (1927); (ii) bias reflecting financial interest of a group for which the

(footnote continued)

The very facts that (i) there have been an infrequent number of cases where bias of a "type" similar to that demonstrated by the Trial Judge has occurred and (ii) the Court has never addressed bias of the type presented in a state court proceeding involving only private parties and initiated to resolve only issues of state law, makes it important that the Court take the opportunity presented by this case to articulate the scope of the due process clause in such situations.

Of course, in determining whether to grant a petition for writ of certiorari, the Court must also consider the merits of the case. In that connection, it is relevant to note that in those few cases involving statements of bias most analogous to that demonstrated by the Trial Judge, federal courts have reversed the decision of the biased judge and any subsequent affirming appellate court decision.[4] For example, in *Roberts v. Bailar*, 625 F.2d 125 (6th Cir. 1980), the United States Court of Appeals for the Sixth Circuit held that a trial judge in a sex discrimination suit had a duty to recuse himself on the basis of a single statement by the judge. There is a remarkable similarity between the statement of the trial judge in *Roberts* ("I know Mr. Graves, and he is an honorable man and I know he would never intentionally discriminate against anybody," 625 F.2d at

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(footnote continues)

decision maker is officially responsible, *e.g.*, Ward v. Village of Monroeville, 409 U.S. 57 (1972); (iii) bias of a decision maker who has been the target of personal abuse or criticism by a party coming before him, *e.g.*, Mayberry v. Pennsylvania, *supra;* (iv) bias of a decision maker who uttered extreme and hostile comments to parties, *e.g.*, Nicodemus v. Chrysler Corp., 596 F.2d 152, 155 (6th Cir. 1979), particularly when the hostility appears to have been directed against an ethnic group, *e.g.*, Berger v. United States, 255 U.S. 22 (1921), or against a race, *e.g.*, United States v. Thompson, 483 F.2d 527 (3d Cir. 1973). It may be concluded that the bias of the Trial Judge in this case is not properly included in any of those "types."

[4] This Court has addressed the significance of subsequent affirming appellate review as follows:

> The remedy by appeal is inadequate. It comes after the trial, and if prejudice exist, it has worked its evil, and a judgment of it in a reviewing tribunal is precarious. It goes there fortified by presumptions, and nothing can be more elusive of estimate or decision than a disposition of a mind in which there is a personal ingredient.

Berger v. United States, 255 U.S. 22, 36 (1921).

127) and the statement of bias by the Trial Judge in the circumstances of this case ("I knew both B.C. Griffith and Robert Dale, they weren't anybody's fools, they were good businessmen and knowledgeable about the oil business and would not have put something in the instrument without some reason, unless it meant something.").[5] That is, in both cases the trial judge (1) indicated his personal knowledge, which was based on extrajudicial contacts, of a person or persons whose actions and intentions were crucial to the point of law in litigation, (2) stated a conclusion about a characteristic or characteristics of that person or those persons which the trial judge concluded was most relevant to the point of law in litigation, and (3) then concluded that the person or persons would not have taken an action forming the key factual dispute of the case.

One cannot properly distinguish the statements of bias in *Roberts* and in this case based on the logic (illogic) of the conclusions of the Trial Judge that the particular characteristics of Messrs. Griffith and Dale were relevant to the point of law in litigation — because it is not the logic (illogic) of the Trial Judge's conclusion which is relevant. What is important is that the Trial Judge's bias importantly influenced his decision on the crucial issue before him. (The timing of the Trial Judge's Statement of Bias, coming immediately before his ruling, and the fact that he ignored long-established precepts of deed construction in his ruling (*see* discussion at pp. 15-18, *infra*) clearly demonstrate that the Trial Judge's decision was primarily based on his biased opinion of Messrs. Griffith and Dale derived from extrajudicial contacts with those men decades ago.) Consequently, it does not diminish the impermissible nature of the Trial Judge's Statement of Bias in this case for

[5] In *Roberts*, as in the instant case, there was no dispute that the remark was made. *See* 625 F.2d at 127.

Harkins to acknowledge that the Trial Judge's conclusion of law, which was importantly based on his Statement of Bias, is illogical.[6]

Also, *Roberts* and the instant case may not be properly distinguished by virtue of the fact that in *Roberts* the United States Court of Appeals for the Sixth Circuit applied a federal statute (28 U.S.C. §§ 144, 455) requiring a federal trial judge to recuse himself where he demonstrates bias or prejudice, whereas in this case the Constitution's due process clause forms the basis of the contention of improper judicial bias. That is, other courts have consistently stated that such federal statute was enacted to protect the constitutional guarantee of a fair trial. *See, e.g., In re International Business Machines Corp.*, 618 F.2d 923 (2d Cir. 1980); *United States v. Sciuto*, 531 F.2d 842, 845 (7th Cir. 1976) ("The right to a tribunal free from bias or prejudice is based, not on Section 144 [28 U.S.C. § 144], but on the Due Process Clause."). Consequently, in *Roberts*, as in the instant case, the underlying basis of the conclusion that the trial judge's statement of bias constituted reversible error is application of the due process clause.

Because the *Roberts* case is on all fours with the case presented, this Court accordingly could apply the reasoning in *Roberts* to control its disposition in this case, specifically that "[o]nce the [trial judge] expressed his *ardent* sentiments about [the character of one of the parties in the case], the *objective appearance of impartiality vanished.*" 625 F.2d at 129-30 (emphasis added).

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[6] That is, it appears that the Trial Judge determined that his conclusion that Messrs. Griffith and Dale were good businessmen, knowledgeable about the oil business, and would not have put something in the Deed without some reason, *required* him to conclude that the Deed's all rights clause must be interpreted so as to conclude that the parties intended *only* the property interest held by the grantor at the moment the Deed was executed would convey. Of course, it does not logically follow that merely because Messrs. Griffith and Dale were good businessmen, knowledgeable about the oil business and would not have put something in the Deed without some reason that they necessarily would have intended that *only* that property interest held by the grantor at the moment the Deed was executed would convey. Indeed, there is a persuasive argument to the contrary based on undisputed principles of contract construction and the after-acquired title doctrine (*see* pp. 15-18 *infra*).

The reasoning followed in *Roberts* might further be applied to the facts presented to formulate as a controlling rule: If a statement by a trial judge would lead a reasonable person to question the impartiality of the trial judge and the judge did not recuse himself, then reversible error is committed. Application of that rule to the facts presented leaves no doubt that a reasonable person would question the impartiality of the Trial Judge following his utterance of the Statement of Bias, particularly because the Trial Judge determined that his conclusions about Messrs. Griffith and Dale expressed in the Statement of Bias *required* him to conclude that the Deed's all rights clause must be interpreted so as to conclude that the parties intended, notwithstanding the clear grant of a 9/32's interest by the Deed's granting clause, *only* the 4.5/32's mineral interest held by the grantor at the moment the Deed was executed would pass to the grantee.

Also, this Court could apply in the circumstances presented the following analytical test which the Court set forth in *United States v. Grinnell Corp.*, 384 U.S. 563 (1966):

> The alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case. Berger v. United States, 255 U.S. 22 [additional citations omitted].

Id. at 583. (In *Grinnell* the Court determined that any adverse attitudes demonstrated by the trial judge were based on his study of evidence and pleadings filed in the proceeding and consequently any bias by him was not improper.)

Applying the *Grinnell* test to the facts presented, first it should be concluded that in the Trial Court proceeding, the Trial Judge's Statement of Bias clearly represented a predisposition toward the evidence, *i.e.*, bias.

Second, the Trial Judge's Statement of Bias clearly stemmed from an extrajudicial source. The face of the Statement of Bias makes clear that the Trial Judge's opinion was not derived from his participation in the proceeding but instead was derived from his personal impressions, apparently

formed decades ago, of the predecessors-in-interest to the parties before him.

Finally, the specific remarks of the Trial Judge reflected in the Statement of Bias and the hearing transcript, as well as the timing of the Trial Judge's Statement of Bias, which was made immediately prior to announcing his decision in the case, strongly support the conclusion that the Trial Judge's opinion on the merits resulted from a basis other than that which he learned from his participation in the case. Reinforcing the conclusion of the controlling effect of the Trial Judge's bias is the fact that his decision was completely contrary to well-settled principles and rules of construction of deeds. *See* discussion at pp. 15-18, *infra.*

3. THIS CASE PRESENTS THE COURT WITH THE OPPORTUNITY TO STATE HOW THE GUARANTEES OF THE DUE PROCESS CLAUSE PROHIBIT ISSUANCE OF A STATE COURT DECISION WHICH IS SO CLEARLY ERRONEOUS AS TO CONSTITUTE ARBITRARY AND CAPRICIOUS ACTION.

In 1927 this Court stated "[w]e cannot interfere [in a state court decision] unless the judgment amounts to mere arbitrary or capricious exercise of power or is in clear conflict with those fundamental 'principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights.' " *American Railway Exp. Co. v. Kentucky, supra* at 273, *quoting Pennoyer v. Neff, supra.*

This case provides the Court with the opportunity to reaffirm that principle stated in *American Railway* more than half a century ago[7] and to articulate under what circumstances

[7] In earlier cases, the Court had also enunciated that principle. *See, e.g.,* Tracy v. Ginzberg, 205 U.S. 170 (1907); this Court stated that although generally the Court will not interfere with a decision of a state court involving nothing more than ownership of property, with all parties in interest before it, a deprivation of property without due process of the law can occur when it results from the arbitrary exercise of power. *See, e.g.,* Postal Telegraph-Cable Co. v. City of Newport, 247 U.S. 464 (1918) (decision of a state court is so clearly ill-founded that the judgment cannot be sustained).

and to what extent the guarantees of the due process clause prohibit clearly erroneous state judicial action.

In applying the principle articulated by the Court in *American Railway*, it is useful to review the discussion of that principle included in a dissenting opinion on a denial of certiorari, *Watson v. Kenlick Coal Co.*, 498 F.2d 1183 (6th Cir. 1974), *cert. denied* 422 U.S. 1012 (1975) (Douglas, J., dissenting) in which it was stated that

> the interpretation and delineation of contractual and property rights is ordinarily a matter of state law, pure and simple, ... an adverse interpretation by a state court, even if erroneous, does not constitute a deprivation of property without due process of law. On the other hand, the Due Process Clause of the Fourteenth Amendment is not wholly without content for purposes of evaluating the arbitrariness of actions by the State; state enactments and regulations may be tested under that Clause against a modest but identifiable standard of minimum rationality. See Williamson v. Lee Optical Co., 348 U.S. 483, 490-491 (1955); cf. Roe v. Wade, 410 U.S. 113 (1973).

Id. at 1018.

Application of the *American Railway* principle to the facts of this case, where there is a complete lack of rational basis for the decision on the merits, should compel this Court to conclude that the decision below is so arbitrary and capricious as to violate the due process clause of the fourteenth amendment. In fact, the Trial Judge's decision was completely contrary to well-settled principles and rules of deed construction under Mississippi real property law. Under Mississippi law, the starting point in construction of a deed is to assume that the deed in question is unambiguous and to attempt to harmonize and give effect to all parts of the deed under a "four corners" construction approach to the instrument. *See e.g., Columbus & Greenville Ry. v. City of Greenwood*, 390 So.2d 588, 591 (Miss. 1980).

If, however, the deed contains elements of ambiguity which cannot be harmonized, the following rules of construction should control: (1) A deed should be construed most

strongly against the grantor and most favorably to the grantee, *e.g., Ouber v. Campbell,* 202 So.2d 638, 641 (Miss. 1967); (2) Where all parts of a deed cannot be harmonized, two conflicting clauses should be reconciled in favor of the first clause, particularly where the conflict is between the granting clause and a subsequent clause (or recital or habendum clause), *e.g., Mississippi Cent. R.R. Co. v. Ratcliff,* 59 So.2d 311, 314 (Miss. 1952); (3) In cases where two provisions in a deed may be in conflict and one provision must either be rejected or varied in order to harmonize the construction of a deed, a court will reject or vary the provision which is expressed in more general terms and about which it is more probable that the grantor was mistaken, *e.g., Dunn v. Stratton,* 133 So. 140 (Miss. 1931); and (4) In an ambiguous deed, the practical construction placed upon it by the parties will have much weight in determining meaning, *e.g., St. Regis Pulp & Paper Corp. v. Floyd,* 238 So.2d 740, 744 (Miss. 1970).

If the deed is construed to reflect that the parties to the deed intended to convey an interest greater than that which the grantor held on the date of the deed's execution, then the doctrine of after-acquired title or "estoppel by deed" is to be applied. That doctrine states that, where a grantor has no title or defective title, or has an estate which is less than he purports to convey, the execution and delivery of a warranty deed estops the grantor from later acquiring any adverse title or interest in the land, and any subsequently acquired title will inure to the benefit of the grantee. *See Turner v. Miller,* 276 So.2d 690, 693 (Miss. 1973); W. Ethridge, Jr., *The After-Acquired Property Doctrine and Its Application in Mississippi,* 17 Miss. L.J. 153 (1945).

Under a proper application of these principles to the facts presented, there can be no doubt but that a full 9/32's interest was conveyed to Robert B. Dale and his successors. Under the primary principle of deed construction, it should have been determined that the Deed was unambiguous; an attempt to harmonize all parts of the Deed should have been made. Accordingly, the all rights clause, which provides that the Deed was to convey "all of grantor's mineral rights," should have

been read as being consistent with the granting clause, which provides that the grantor was conveying a 9/32's interest in the mineral rights. That is, the all rights clause could certainly be reasonably interpreted as conveying not only all the interest of the grantor at the moment the Deed was executed but also that interest which he subsequently should acquire. Certainly, such an interpretation provides for a result recognized by Mississippi law under application of the after-acquired title doctrine.

Even if it were determined that the all rights clause created an ambiguity, application of the controlling principles cited above requires the conclusion that a 9/32's interest was conveyed. First, the Deed should have been construed most strongly against the grantor, Griffith. Second, assuming, *arguendo,* that there is a conflict between the first (granting) clause and the subsequent (all rights) clause, the conflict should be resolved in favor of the granting clause—which clearly states that a 9/32's interest was conveyed. Third, applying the principle that the more specific clause should prevail, of the two clauses in the Deed which could be read to be in conflict, the granting clause, clearly conveying a 9/32's interest, is the most definite and certain part of the Deed and should prevail over the arguably indefinite but certainly more general statement of the all rights clause.

Finally, a review of the practical construction placed upon the Deed by the parties indicates that subsequent to execution of the Deed, the grantee, Robert B. Dale, consistently represented that he had acquired the full 9/32's interest given him in the granting clause by, *e.g.,* executing leases for the underlying property containing provisions reflecting that assumption; whereas the grantor, Griffith, did not allege any claim to the 4.5/32's interest in dispute until after an oil and gas field had been discovered on the property—32 years *after* execution of the Deed.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Mississippi Supreme Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, WILLIAM F. COCKRELL, JR., Counsel of Record for Petitioners herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 12th day of November, 1982, I served copies of the foregoing Petition For A Writ of Certiorari on the parties by mailing three copies of said document by first class United States mail, in duly addressed envelopes, with postage prepaid, to each of the following persons:

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